

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

January 24, 2006 Session

STATE OF TENNESSEE v. JOANNE GELENE IRWIN

Direct Appeal from the Criminal Court for Knox County
No. 75518 Richard R. Baumgartner, Judge

No. E2005-00908-CCA-R3-CD - Filed March 31, 2006

The defendant, Joanne Gelene Irwin, was convicted of two counts of simple assault, Class A misdemeanors. See Tenn. Code Ann. § 39-13-101 (1997). After merging the two counts of simple assault, the trial court imposed a sentence of eleven months and twenty-nine days and ordered thirty days of confinement. The defendant was fined \$1,000. Judicial diversion was denied. In this appeal of right, the defendant argues that she should have been permitted to introduce evidence of the juvenile record of the victim for impeachment purposes under Rule 609 of the Tennessee Rules of Evidence; that the trial court submitted erroneous instructions to the jury; that the trial court imposed an excessive sentence; and that the trial court abused its discretion by denying judicial diversion. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which WILLIAM H. INMAN, SP. J., and JAMES CURWOOD WITT, JR., J., joined.

Michael T. Cabage, Knoxville, Tennessee, for the appellant, Joanne Gelene Irwin.

Paul G. Summers, Attorney General & Reporter; Leslie Price, Assistant Attorney General; and Ta Kisha M. Fitzgerald, Philip H. Morton, and Mitchell T. Harper, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

In the spring of 2002, the victim, Ladashia Janee Rucker, was an eighth grade student at the Karns Annex School. The defendant, employed as a bus driver, drove the victim and five or six others to and from school each day. An aide, identified only as Mr. Bennett, was ordinarily on the bus to help supervise the students. On the morning of May 17, 2002, the defendant and the victim had an argument. In the afternoon, while the victim was being transported to her residence, the argument escalated into a physical altercation which resulted in the arrest of the defendant.

At trial, the victim, by then a tenth grader, testified that on the morning of the offense, she was arguing with a fellow student, Trey Hackler, when the defendant loudly ordered, "[S]hut up!" According to the victim, she responded, "You can't talk to me like that 'cause you ain't my mama." The victim claimed that the defendant made a reference to her own daughter to which the victim responded, "[She] can be squished" While acknowledging that she had called the defendant a bitch during the course of the argument, the victim claimed that the defendant had used the same word to describe her. She maintained that the argument continued until just before the aide boarded the bus at a Kroger grocery store. The victim stated that she informed the aide about the argument and later, after arriving at school, provided a written statement about the incident to the principal.

The victim testified that sometime after she boarded the bus that afternoon to return to her residence, she overheard the defendant, who was on a cell phone, warn, "Don't smack her down too hard." By then, the aide had left the bus. The victim further testified that soon after the phone conversation ended, the defendant stopped at her own house and that the defendant's daughter, Christina, ran toward the bus. According to the victim, the defendant allowed her daughter to board the bus for the apparent purpose of retaliating for the derogatory remarks she had made earlier that morning. She testified that the defendant's daughter, who was "way bigger" than her, confronted her and then struck her. The victim stated that she fought back but during the course of the struggle, the defendant joined in, grabbing the victim by her neck and holding her while her daughter struck her in the face. The victim testified that some of her hair had been pulled out, leaving her with a bald spot. She stated that the defendant never attempted to stop the fight and claimed that she was an agitator in the incident. According to the victim, Trey Hackler and Joann Brooks, another occupant, attempted to pull the defendant off of her and that others on the bus had also helped stop the initial altercation. She stated, however, that the battle resumed in the back of the bus and that when she was able to get the upper hand over Christina, pulling out some of her hair, the defendant again intervened, grabbing the victim by her hair. The victim, who weighed less than ninety pounds, contended that she wanted the fight to stop but had to defend herself. She recalled that another student, Chelse Christian, got off the bus and persuaded a male bystander to stop the melee. The victim testified that during the struggle, her pants were removed, both shoes came off, and her shirt was ripped. She stated that when the defendant's daughter left the bus, the defendant drove to the home of Ms. Brooks, where she ordered the victim to get off the bus. She recalled that she left the bus wearing only her shorts, her shirt, and a single shoe. She maintained that her pants and her other shoe were never returned, that she had to wear a neck brace for three weeks, and that she received a permanent scar. The victim testified that she went inside the Brooks home and, after discussion, Ms. Brooks' grandmother called the police. The victim declined ambulance service, explaining that her mother took her to the hospital. The police took photographs of her injuries.

On cross-examination, the victim acknowledged that during the school year, she had left Vine Middle School in order to avoid conflicts with some of the other female students. She acknowledged that about a month before this incident, she got into a fight on a bus. The victim admitted that the bus driver, possibly the defendant, notified the police in that situation, which resulted in the victim's arrest. She denied having trouble with any of the students at Karns Annex, asserting that the other school bus incident some thirty days earlier was her only previous altercation. She testified that she

had never engaged in a fight at any other school. The victim acknowledged that the defendant's daughter had been on the bus on prior occasions. She also admitted that shortly after the incident her family had filed a civil suit against the defendant seeking damages.

Joann Brooks, age sixteen at the time of trial, testified that she was also a passenger on the bus on the morning and afternoon of May 17, 2002. She recalled that the defendant and the victim engaged in an argument, each calling the other a bitch. She then overheard the defendant say, "[T]here's a fly flying around," to which the victim responded, "[Y]our daughter can be squashed like a fly." Ms. Brooks remembered that the defendant then told the victim that her daughter could "blow [the victim] away." She testified that when the aide boarded the bus shortly thereafter, the victim informed him of the argument. Ms. Brooks confirmed that she and the victim had also told their teacher about the incident when they arrived at school and had to submit a written statement.

Ms. Brooks stated that on the bus ride home that afternoon, the defendant dropped off some of the occupants and then made a phone call during which she said, "Don't smack her too hard, don't smack her down." She corroborated the victim's claim that the defendant stopped the bus in front of her own house and allowed her daughter to board. She recalled that the defendant's daughter confronted the victim saying, "What's this about [the victim] talking stuff," and then striking her before she received an answer. She testified that a fight ensued, at which point the defendant approached the two girls, picking the victim up by her neck. Ms. Brooks stated that she attempted to pull the defendant's daughter off of the victim while Trey Hackler attempted to force the defendant away from her. It was her recollection that the fight was temporarily stopped before the two girls re-initiated the altercation. She testified that the defendant then grabbed the victim's braids while her daughter struck her. Ms. Brooks stated that when the victim was able to push the defendant's daughter to the floor of the bus, the defendant grabbed the victim's hair and said, "Well, you're not getting the best of my daughter no more." She recalled that a man then boarded the bus and stopped the fight. According to Ms. Brooks, the defendant ordinarily would have dropped off another student, Chelse Christian, next but instead drove straight to the Brooks' residence. She overheard the defendant tell the victim that she "needed" to get off the bus there. Ms. Brooks described the victim as having "scratches all over" and "a big old bald spot in the back of her hair." She confirmed that the victim was missing her pants and one of her shoes. Ms. Brooks acknowledged that she had an argument with the defendant's daughter about a month before this incident.

Chelse Christian, fifteen years of age at the time of trial, testified that she rode the bus to and from school on the day of the fight. According to Ms. Christian, who was in juvenile custody at the time of her testimony, the defendant stopped at her own house during the afternoon route and blew the horn for her daughter. She stated that Christina entered the bus, "got in [the victim's] face," and started punching her. Ms. Christian also testified that the victim fought back before the defendant joined in, grabbed the victim by the throat, and held her while her daughter struck and kicked her. She recalled seeing the hair pulled out of the victim's head. Ms. Christian maintained that the defendant made no effort to separate the two combatants and so she got off the bus to ask a male bystander to call the police. She recalled that the man boarded the bus and brought an end to the

struggle. Ms. Christian contended that after the fight was concluded, the defendant closed the door to the bus and would not let her back on until she pled to be allowed "to go home."

Trey Hackler, who described his argument with the victim that morning as a friendly one about whether it had rained the previous day, testified that the defendant ordered them to "shut up," to which the victim responded, "You can't tell me to shut up 'cause you're not my mama." Hackler stated that an argument ensued and the defendant warned the victim, "My daughter would wear you out. You don't want none of my daughter." He recalled that the victim responded, "She should be squashed." Hackler, who acknowledged that he had points taken away at school because of the argument, testified that the conflict between the victim and the defendant resumed during the afternoon bus ride. He stated that the defendant then called her daughter by cell phone saying, "Don't smack her down too hard." He testified that the defendant drove to her house where her daughter ran onto the bus and struck the victim in the face. Hackler otherwise corroborated the testimony of Ms. Brooks and Ms. Christian. He confirmed that the defendant closed the door to the bus and started to drive away without Ms. Christian while she begged for reentry.

Dr. Karen Loy, the principal at Karns Annex Alternative Program, testified that on the morning of the altercation, she talked to the victim's teacher about the initial argument between the defendant and the victim. She stated that she had a discussion with the three girls involved in the incident to verify that it was okay to get back on the bus in the afternoon. Dr. Loy described the victim as "low key" and social. She also stated that it was the obligation of the bus driver to report unruly behavior on the bus and confirmed that the defendant had not reported either the argument that morning or the fight in the afternoon. She testified that bus drivers were not trained to intervene in physical altercations on the bus and that aides routinely ride the buses in order to help supervise the students. Dr. Loy also stated that it was school policy not to allow anyone other than the students, the driver, and the aides to board the buses.

Knoxville Police Officer Greg Womac, who investigated the incident, submitted photographs of the victim. He stated that the victim had cuts and abrasions on her chest, back, and the side of her neck and that she was holding a lump of her hair. The officer described the victim as withdrawn and quiet.

The defendant, a bus driver for five years, testified that she had driven the bus with Karns Annex for one school year. It was her testimony that other than this incident, she had never been cited for any problems on the bus. The defendant acknowledged that she had allowed her daughter to ride the bus on prior occasions but only so they could spend some time together. She stated that she was also employed by Conoco Bread Box at the time where she worked seven days a week with double shifts, never missing a school day as a bus driver. She explained that the aide, Mr. Bennett, routinely missed time on the bus because of a second job. It was her opinion that the victim, who she claimed was the agitator, was angry with her because of the incident a month earlier that resulted in juvenile detention. The defendant denied having cursed the victim and asserted that when she directed the victim and Hackler to be quiet, the victim called her a bitch three times. She maintained that the victim threatened to smash her daughter "like a bug," a threat that she considered to be

serious. The defendant contended that the victim also made a statement about a baby the defendant delivered that had died at birth. She insisted that she informed her aide of what had happened when he boarded the bus and acknowledged that she had informed her daughter, Christina, of what had happened after returning home from the morning bus ride.

The defendant testified that she dropped off her aide that afternoon before calling her daughter and informing her that she needed to stop by the house for some insurance papers. She contended that she instructed her daughter not to speak to the victim when she boarded the bus but that she turned her head momentarily after her daughter delivered the papers. The defendant stated that she heard a fight break out, begged the victim to stop, and tried to pry the victim's hands off of her daughter. She claimed that she never held the victim down, never touched her throat, and never grabbed her hair. The defendant testified that Trey Hackler grabbed her, that Ms. Brooks grabbed her daughter, and that another girl on the bus slung her daughter to the back of the bus. It was her testimony that after the initial altercation was stopped, her daughter was curled up in a fetal position while the victim sat beside her with her foot in her daughter's face. She claimed that she thanked the individual who boarded the bus to break up the fight. The defendant explained that because she was frantic, she started to close the door and leave before allowing Ms. Christian to return to the inside of the bus. She denied that she had ordered the victim to get off the bus at Ms. Brooks' home, insisting that the victim did so voluntarily. The defendant contended that she called the police once she had finished her route and had driven to her second job at Conoco Bread Box. She maintained that she had bruises on her arm and that her daughter had bruises and had lost some hair. She testified that following the incident, the victim threatened her on the telephone and filed a \$10,000 lawsuit against her. The defendant described the victim as a "thin little girl with a big mouth" but nevertheless likable. She explained that she did not return a call from Officer Womac because she wanted the opportunity to talk to a lawyer first. She admitted that she did not inform the school about the incident and had been dismissed from her job on the Monday following the incident. She explained that her daughter, who was seventeen at the time of trial, had left home and "ran off with a boy" and was not, therefore, available to testify.

I

As her first issue, the defendant argues that the trial court erred by limiting her cross-examination of the victim about her prior juvenile record under the terms of Rule 609. After the victim testified that she only engaged in fights as a means of self-defense, the defense sought to cross-examine her about juvenile charges of burglary and assault. Defense counsel asked the victim if she had previously entered the residence of an individual by the name of Rachel Clark and struck her in the face and head. The victim denied that she had done so. When the defense sought to introduce juvenile court records, which listed charges of aggravated burglary and assault, the state objected and the trial court conducted a jury-out hearing. Upon questioning, the victim denied that she had pled guilty to either of the charges. The trial court then ruled that the document was not admissible under the terms of Rule 609 of the Tennessee Rules of Evidence, the pertinent parts of which provide as follows:

(a) General Rule. — For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

(1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.

....

(d) Juvenile Adjudications. — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

Tenn. R. Evid. 609(a)(1), (d) (emphasis added).

The defense offered as an exhibit a copy of a juvenile petition issued May 19, 2004. The document contained allegations that the victim had violated the probation granted on January 8, 2004, by being involved in shoplifting. An attached document with a caption, "Pre-appearance Summary and Court Notes," indicated a court appearance on January 8, 2004, on charges of burglary and assault arising out of an incident which had reportedly taken place four months earlier. The attachment reflected a plea of guilty on the assault charge but no disposition by the juvenile judge and a nolle prosequi on a charge of aggravated burglary.

In State v. Butler, 626 S.W.2d 6, 10 (Tenn. 1981), prior to the passage of the Tennessee Rules of Evidence, our supreme court adopted Federal Rule 609(d) without abandoning its general "policy that juvenile adjudications are not to be used on collateral matters" absent a showing of necessity. It held that a fist fighting adjudication was inadmissible because it was a misdemeanor and involved neither dishonesty nor false statement. 626 S.W.2d at 11. The decision also approved the exclusion of a juvenile shoplifting adjudication because the defense had failed to establish that its admissibility was essential for a fair determination on the issue of guilt or innocence of the accused. Id.

In State v. Bowers, 762 S.W.2d 889 (Tenn. Crim. App. 1988), however, some juvenile adjudications were deemed admissible to impeach an adult witness for the state. This court ruled that there were three requirements governing the admission of juvenile adjudications for impeachment purposes:

- (1) the witness must be a person other than the accused;
- (2) the offense, if committed by an adult, must be admissible to attack the credibility of an adult witness; and

(3) the admission must be necessary for a fair determination of the accused's guilt or innocence.

762 S.W.2d at 891-92. Juvenile determinations of guilt for attempting to commit a felony by fraud, third degree burglary, and larceny by trick were cited as examples of offenses involving dishonesty and also necessary for a fair determination. Thus, the juvenile adjudications were deemed admissible for the purpose of impeaching the state witness. Id. at 893; See Tenn. R. Evid. 609(a)(2). In Bowers, this court also ruled that juvenile adjudications of aggravated assault would be admissible for impeachment purposes so long as the probative value outweighed the prejudicial effect. 762 S.W.2d at 892.

The exhibit at issue, while suggesting a guilty plea by the victim for the assault charge, contains no disposition. In her brief, the defendant concedes that the document contains no order of adjudication but nevertheless argues that the part indicating a plea of guilty to the assault charge should be admitted. Because there was no clear adjudication of guilt, as required by the rule, Tennessee Rule of Evidence 609 would not afford the defendant relief. Although the document, if an adjudication, might have met the criteria for admission for impeachment purposes, the lack of a disposition precluded its usage in this instance. In our view, there was no error.

II

The defendant next argues that the trial court erred by failing to adequately answer a question asked by the jury after deliberations began. The trial court instructed the jury on simple assault as follows:

Any person who commits an assault upon another is guilty of a crime.

For you to find the defendant guilty of this offense as charged in the first count, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) that the defendant caused bodily injury to [the victim]; and
- (2) that the defendant acted either intentionally, knowingly or recklessly.

During deliberations, the jury sent a note with the following question: "Does the element [number one] mean that the defendant personally induced the injuries on [the victim]?" The trial court responded, "To find the defendant guilty of Count One you must find that '[t]he defendant caused bodily injury to [the victim].'" The jury then asked, "Does 'cause' mean to cause the situation to occur or to physically induce the injury herself." The trial court responded, "That is a matter for the jury's determination. I cannot further define 'cause.'" The defendant argues that the trial court "should have answered the jury's questions regarding the responsibility of the defendant to cause bodily injury to the victim." She argues that the jury was confused by the answers.

Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury, which dictates that all issues of fact be tried and determined by a jury. U.S. Const. amend VI; Tenn. Const. art. 1, § 6; see State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991); Willard

v. State, 130 S.W.2d 99, 101 (1939). This right encompasses the defendant's right to a correct and complete charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). In consequence, the trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see State v. Forbes, 793 S.W.2d 236, 249 (Tenn. 1990); see also Tenn. R. Crim. P. 30.

Our law requires that all of the elements of each offense be described and defined in connection with that offense. See State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989). When the evidence in the record fairly raises or supports the existence of a defense, the trial court is compelled to instruct the jury on the issue. Manning v. State, 500 S.W.2d 913, 915-16 (Tenn. 1973); see also Almonrode v. State, 567 S.W.2d 184, 187 (Tenn. 1978). As part of its instruction, the trial court must inform the jury that any reasonable doubt on the existence of the defense requires acquittal. Tenn. Code Ann. § 39-11-203(c); State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998); State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993).

In this case, the trial court instructed the jury in accordance with the pattern instructions. See Tennessee Pattern Jury Instructions Crim. 6.01. Further, the instructions fairly and fully state the elements required to commit a simple assault. See Tenn. Code Ann. §39-13-101(a)(1) (2003).

When a jury asks questions regarding the definition of legal terms, the trial court should consult with counsel and provide supplemental instructions. State v. Terrance D. Nichols, No. W2003-01043-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., at Jackson, Mar. 8, 2005); State v. Pamela Sue King, No. M2000-00148-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., at Nashville, Nov. 9, 2001). That duty does not, however, extend to commonly used words or terms which are understood by persons of ordinary intelligence. State v. Summers, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985).

In context, the jury instructions fairly submitted the legal issues. The word "cause" is a commonly used term. There was evidence in the record that the defendant arranged a confrontation between her daughter and the victim. Photographs submitted as exhibits depicted the injuries of the victim. The defendant involved herself in the fracas. She first intervened before being restrained by the occupants of the bus. She intervened a second time when the fight resumed. According to state witnesses, the defendant used physical force against the victim on each occasion. From these circumstances, the jury could reasonably infer that she caused injury to the victim.

III

Next, the defendant insists that the trial court erred by denying judicial diversion. She argues that because the probation officer found her to be a suitable candidate based upon her prior social history, she should have been granted diversion. The defendant asserts that the trial court considered only the nature and circumstances of the offense without weighing the remaining relevant factors.

The judicial diversion statute provides that after an adjudication of guilt, a trial court may defer entry of judgment until a defendant successfully completes a diversion program or violates a

condition of his release. See Tenn. Code Ann. § 40-35-313 (2003). If a defendant is successful, the statute provides for expungement from "all official records . . . all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section." Tenn. Code Ann. § 40-35-313(b). The effect of dismissal under the diversion statute "is to restore the person, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information." Id.

A defendant who meets the prerequisites of section 40-35-313(a)(1)(B)(i) is not entitled to judicial diversion as a matter of right. State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993). The decision to grant or deny judicial diversion rests within the sound discretion of the trial court and will be overturned only after a finding of an abuse of that discretion. Id. "This Court . . . will not interfere with the refusal of the trial court to grant judicial diversion if there is 'any substantial evidence to support the refusal' contained in the record." Id. (quoting State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992)).

The criteria that the trial court must consider in deciding whether to grant or deny judicial diversion include: (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the status of the accused's physical and mental health, and (f) the deterrence value to the accused as well as others. See State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). In addition, the trial court should determine whether judicial diversion will serve the ends of justice. Id. The trial court must consider all of the enumerated criteria and must clearly articulate on the record the specific reasons for its determination. See State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989); Hammersley, 650 S.W.2d at 355; State v. Markham, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988). If the trial court fails to place the reason for the denial of diversion on the record, this court must review the evidence to "determine whether the trial court reached the correct result notwithstanding its failure to explain its reasoning." State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998).

Many of the factors weigh in favor of the defendant. She was in good health, was gainfully employed, had a high school education, family support, and no alcohol or illegal drug issues. Nevertheless, even when a defendant, as a first offender, qualifies for judicial diversion, "the circumstances of the offense may alone serve as the basis for denial." State v. Kyte, 874 S.W.2d 631, 634 (Tenn. Crim. App. 1993); see also State v. Sutton, 668 S.W.2d 678, 680 (Tenn. Crim. App. 1984). In this instance, the trial judge, who saw and heard the witnesses firsthand, denied diversion based solely upon the circumstances of the offense. The trial court was particularly disturbed because the defendant, who had been charged with the care and protection of the students on her bus, planned a retaliation for the victim's misconduct. The evidence suggested that the defendant deviated from her normal bus route in the afternoon, timed the confrontation during the absence of the teacher's aide, and planned on the assistance of her daughter, warning her by telephone not to "beat [the victim] down too bad." The trial court implicitly held that the defendant lacked candor in her testimony. Moreover, the trial court concluded that when the retaliation effort did not go as planned, the defendant assaulted the victim on two separate occasions. Under these circumstances, it is our view that the trial court did not abuse its discretion by denying judicial diversion.

IV

As her final issue, the defendant argues that the trial court erred by ordering that she serve thirty days of confinement. She claims that she was entitled to immediate probation.

In misdemeanor sentencing, the trial court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. The sentence must be specific and consistent with the purposes of the 1989 Sentencing Act. Tenn. Code Ann. § 40-35-302(a), (b) (2003). Not greater than seventy-five percent of the sentence should be fixed for service by a misdemeanor offender; however, a DUI offender may be required to serve the full one hundred percent of his sentence. Tenn. Code Ann. § 40-35-302(d); Palmer v. State, 902 S.W.2d 391, 393-94 (Tenn. 1995). In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Tenn. Code Ann. § 40-35-302(d).

Upon service of the required percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. The trial court retains the authority to place the defendant on probation either immediately or after a term of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f). The statutory scheme is designed to provide the trial court with continuing jurisdiction in the misdemeanor case and a wide latitude of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; and the deterrent effect upon and best interests of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). The nature and circumstances of the offense may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983).

Moreover, in State v. Ashby, 823 S.W.2d 166, 171 (Tenn. 1991), our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. See State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). "It is not the policy or purpose of this [c]ourt to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

The pre-sentence report establishes that the defendant was thirty-five years of age at the time of her sentence. As indicated, she was a high school graduate, enjoyed good health, and had no prior record. A bus driver for most of her career, the defendant was employed by K-Trans Bus Lines in Knoxville at the time of her hearing. Ordinarily, that background would suggest either the grant of immediate probation or a limited period of "shock" incarceration. For the same reasons the defendant was not granted judicial diversion, however, the trial court imposed a thirty-day jail sentence. Among the statutory factors pertinent to confinement, is the following consideration: "Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses" Tenn. Code Ann. § 40-35-103(1)(B) (2003). Although convicted only of a misdemeanor, the defendant had been placed in the position of the trust and care of minors. From the evidence presented at trial, she first encouraged and then participated in the assaults. Several witnesses confirmed that she had planned the incident in retaliation for disrespectful conduct exhibited by the victim on a bus ride on the same morning. The defendant chose to involve her daughter in a physical altercation and subsequently participated in the assault. Although the defendant denied having planned the incident, the trial court specifically accredited the testimony of the students on the bus, implicitly holding that the defendant's claims to the contrary lacked candor. Under these circumstances, the trial court is entitled to deference.

Accordingly, the judgment is affirmed.

GARY R. WADE, PRESIDING JUDGE